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LOCAL INSPECTION BY MAGISTRATE.

Our Judicial system gives to the court only power to adjudge the existence of facts accordingly as they are deposed to on the evidence before it. *Babbon Sheik* v. *King Emperor.*[1] But in some cases it may be difficult to appreciate the evidence without a complete model showing the property and its surroundings or without local inspection. The law makes no provision for such an inspection by a Magistrate in a case which is being tried by himself: *Queen Empress* v. *Mani Kam*[2]; *Hari Kishore Mittra* v. *Abdul Baki Miah*[3]: and the only sections of the Code of Criminal Procedure which allow of local investigations and local inspections of any kind are Ss. 148, 202 and 293. *Hari Kishore Mittra* v. *Abdul Baki Miah*[3]; *Babbon Sheik* v. *King Emperor.*[1]

S. 148 provides that in cases under Chapter XII the District Magistrate or Sub-Divisional Magistrate may direct some other Magistrate subordinate to him to make a *local enquiry* and the report of such Magistrate may be read as evidence in the case. S. 202 lays down that if a Chief Presidency or any other Presidency Magistrate authorised by the Local Government in this behalf or any Magistrate of the first or second is not satisfied as to the truth of a complaint he may, before issuing process direct a *local investigation* by any officer subordinate to such Magistrate or by a Police Officer or by such other person not being a Magistrate or Police Officer as he thinks fit and, under S. 203 the result of such investigation shall be taken into consideration in deciding whether there is sufficient ground for proceeding with the case or not. S. 293 provides for jurors or assessors in a sessions trial, viewing the place of occurrence or any other place in which any other transaction material to the trial is alleged to have occurred. There seems to be no provision however for the Sessions Judge himself joining in the ins-

1. (1910) I. L. R. 37 C. 340 S. C. 14 C. W. N. 422 per Woodroffe J.
2. (1896) I. L. R. 19 M. 263=2 Weir 725 s. c. 6 Mad. L. J. 143.
3. (1894) I. L. R. 21 C. 920 per Rampini J.

pection *Babbon Sheik* v. *King Emperor*[1] although in *Oudh Behari Narayan Singh*[2] it was not questioned that the Judge himself could visit the place of occurrence and it was held that he should proceed therewith the assessors, after due notice to the parties, before the case is closed.

Though there is no express statutory provision in that respect the case law and the practice of the courts appear to establish that a Magistrate may take a view of the *locus in quo* in order to enable him to understand the evidence that is laid before him *Babbon Sheik* v. *King Emperor.*[1]

In the case of *Nidani Mondal* v. *Alaboxa Sircar*[3] Woodroffe J. observed " that local investigation except where expressly provided by law is not advisable " but in *Babbon Sheik* v. *King Emperor*[1] the learned Judge is reported to have said that his language in the former case was not sufficiently guarded and must be taken in connection with the facts of that case where the Magistrate held a local inspection after the close of the case and relied mainly upon inferences drawn therefrom contrary to the evidence on behalf of the accused and the result of the observation made was not communicated to them.

In the aforesaid case of *Babbon Sheik* v. *King Emperor,*[1] *D. Chatterji* J. was of opinion that the Legislature in the Code of Criminal Procedure, 1898, in amending the explanation to S. 556 and enacting that a Magistrate shall not be disqualified from trying a case " by reason only that he has viewed the place in which an offence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an enquiry in the case " overruled those cases which had held that merely by viewing the *locus in quo* the Magistrate made himself a witness in the case and could not try it. It thus saved the Magistrate's jurisdiction to try a case notwithstanding that he may have made a local inspection or investigation although it did not directly authorise him to make such inspection. The learned Judge referred to (a) *Girish Chandra Ghose* v. *Queen Empress,*[4] (b) *Hari Kishore Mittra* v. *Abdul Baki Miah,*[5] (c) *Queen Empress* v. *Mani Kam.*[6]

The first of these cases hardly deals with a " local inspection by the trying Magistrate in the course of the trial. In this case the Magistrate had himself taken an active part in dispersing the unlawful assembly, in other words, he had exercised the power

1. (1910) I.L.R. 37 C. 340. 2. 1 C. L. R. 143.
3. (1905) 9 C.W.N. CCXXII. 4. (1893) I. L. R. 20 C. 857.
5. (1894) I. L. R. 21 C. 920. 6. (1896) I.L.R. 19 M. 263 s.c. 6 M L.J. 143.

given to him by S. 127 Cr. P. C. and subsequently took pains to collect the evidence showing the connection of the accused with the offence charged. This case is similar to that of *J. F. Harrison* v. *Mayor and others Justices of Middlesex*[1] where one of the Justices on the bench had taken an active part in the proceedings and *Blackburn* J. (*Quain* and *Field* JJ. concurring) held that he ought not to have taken part in the trial. In the second case (*Hari Kishore Mittra* v. *Abdul Baki Miah*[2]) the Magistrate did much more than merely viewing the *locus in quo*. He held a local enquiry extending over five days during which he made a number of notes and acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination.

The case of *Girish Chandra Ghosh* v. *Queen Empress*,[3] was followed in *Sudhama Upadhya* v. *Queen Empress*,[4] which laid down that where investigations of the police preliminary to a trial were directed to a very considerable extent by a Magistrate, such Magistrate was personally interested in the case and was disqualified from trying it by S. 555 of the Criminal Procedure Code of 1882 corresponding to S. 556 of the present Code and the Legislature had under its consideration these cases in exacting the explanation to S. 556 in the present form.

In *Babbon Sheik* v. *King Emperor*,[5] referred to above *Stephen* J. held that the Code of Criminal Procedure is not exhaustive and it cannot by omitting to justify a certain course of action on his part deprive him of powers which he otherwise possesses.

In English Law the only provision for a local inspection is one which corresponds to S. 293 of our Code of Criminal Procedure. The jury in a criminal trial may have a view of the *locus in quo* if it is within the same county as that in which the trial takes place and if the court thinks that a view would be of service to them (Halsbury's, Laws of England, Volume 9 p. 369.) It is competent for the judge to permit the jury to view the *locus in quo* at any time during the trial, even without the consent of the prosecutor and even after his summing up but he should take precautions not to allow *improper* communications being made to them at the view. (Archbold's Criminal Pleading 23rd Edition p. 212.)

Local inspections however must be strictly subject to the limitations that have been laid down. In the first place the enquiry

1. (1875) 1 Q. B. D. 173.
2. (1894) I. L. R. 21 C. 920.
3. (1893) I. L. R. 20 C. 857.
4. (1896) I. L. R. 23 C. 328.
5. (1910) I. L. R. 37 C. 340,

should be strictly an inspection of the *locus in quo* with a veiw to understand the evidence on the record; (*Babbon Sheik* v. *King Emperor;*[1] *Hari Kishore Mittra* v. *Queen Empress;*[2] *Queen-Empress* v. *Mani Kam*);[3] and every possible precaution should be taken that such a view should be nothing but a view of the local features. *Babbon Sheik* v. *King Emperor*[1] and *Satri Dulali* v. *Empress.*[4] It is highly improper for a Magistrate to take evidence on the spot without observing all the safeguards by which evidence on which a Judge may act is protected by law and any irregularity in this respect cannot be cured by the Magistrate putting in his notes as evidence and by his allowing either the prosecution or the defence to cross-examine him. Such a proceeding is not contemplated by any provision to be found in the written law of this country and is one which must have a tendency to shake the confidence of the people in the administration of justice.[2] Further it has been frequently ruled that when a Judge is the sole Judge both of law and fact he cannot give evidence before himself (*Hari Kishore Mitra* v. *Queen Empress*[2] and *Empress* v. *Donelly.*[5]) Secondly an immediate report of what is seen should be placed on the record and laid open to the scrutiny of the parties (*Babbon Sheik* v. *King Emperor*)[1]. Thirdly the Magistrate should invariably be accompanied by both parties as their representatives (*Queen Empress* v. *Mani Kam*[3] and *Queen Empress* v. *Chanbasa Madiapa*).[6]

The reported cases condemn local enquiries held by Magistrates with a view other than to understand the evidence placed before them (*Hari Kishore Mittra* v. *Queen Empress*[2]) and where no record was kept of the result of such inquiry) *Nidani Mondal* v. *Alaboxa Sircar,*[7] *Lal Behari Saha* v. *Bejoy Sankar Sikdar,*[8] *Kundro Mohan Panigrahi*[9]) and where in a proceeding under S. 145 Criminal Procedure Code the Magistrate instead of deputing a Subordinate Magistrate to hold a local enquiry as provided in S. 148 Criminal Procedure Code did it himself and wholly discarded the evidence on the record and decided the case upon what he saw, heard and inferred on the spot, it was held that the Magistrate had erred materially in his jurisdiction. *Lal Behari Saha* v. *Bejoy Sankar Sikdar.*[8]

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1. (1910) I. L. R, 37 Cal. 340 s. c. 14 C. W. N. 420.
2. (1894) I L. R. 21 Cal. 220.
3. (1896) I. L. R. 19 M. 263=2 Weir 725=6 M. L. J. 143.
4. (1899) 3 C. W. N. 607. 5. (1877) I. L. R. 2 Cal. 405.
6. Ratanlal's unreported Criminal Cases, p. 854.
7. (1905) 9 C. W. N. 222 N. 8. (1905) 10 C. W. N. 181.
9. (1907) 12 C. W. N. 153 N.

The question arises can the Magistrate test the sworn testimony on the record by the light of his own observation. In *Babbon Sheik* v. *King Emperor*[1] referred to above. *Stephen* and *D. Chatterji* JJ. take the view that he can and *D. Chatterji* J. relies on *In re Lalji* [2] and *Lal Behari Saha* v. *Bejoy Sankar Sikdar*.[3]

As laid down by their Lordships of the Judicial Committee in *Harpurshad* [4] "a judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts." It is one of the cherished and salutary principles of English Criminal Jurisprudence that no man shall be convicted except upon evidence which he has had an opportunity of testing by cross-examination and contradicting by rebutting evidence. If the Magistrate therefore imports into the case any facts which he has himself observed he would be introducing into the case evidence which has not been subjected to these tests and in regard to which he may have been misled by his senses or based in favour of either party (*Babbon Sheik* v. *King Emperor* Per *Chatterji* J.)[1]. In the words of *Woodroffe* J.[1] there is no authority for holding that a court may take a view of the locality for any purpose other than that of understanding the evidence, for example, to see whether the complainant or the accused is speaking the truth on a certain point. If it is permissible there appears to be in such a case no necessity for evidence at all as regards this particular fact. It would be sufficient that the complainant should allege a certain state of facts. Then without his oath to that effect or evidence given on behalf of the accused the court might go itself and ascertain the truth or falsity of the alleged fact. Would it for instance be open to a Judge however expert he might be on the subject to pronounce on the strength of his personal observation against the truth of an allegation that a room was dark or deprived of air? The matter may be tested in another way. Where the court limits its judgment strictly to the materials placed before it by the parties in court then its judgment can be tested by the court of appeal by reference to the same materials which are also before the appellate court. This is not possible where the lower court's judgment is based on personal observations out of court. If the Court's impartiality or accuracy of observation were by a party put in question is it to be said that in all such cases the result of the court's observation must be accepted even though it may be at variance with the sworn testimony of

1. (1910) I. L. R. 37 C. 340.
2. (1897) I. L. R. 19 A. 302.
3. (1905) 10 C. W. N. 181.
4. (1876) L. R. 3 Indian Appeals p. 259.

numerous and reliable witnesses ? And if not what means has the appellate court in such a case of deciding the matter ?

It goes without saying however that if the Magistrate has seen a certain state of things and if witnesses examined before him testify to the contrary it is natural that he should believe the testimony of his own senses and disbelieve the sworn testimony. It seems to be a psychological impossibility that he should do otherwise and in spite of all possible safeguards the fact of local inspection by the Magistrate, particularly when the idea of such inspection emanates from the Magistrate himself, may very often give rise to a not unreasonable apprehension in the mind of either of the parties concerned. In the famous words of *Lush* J. in *Serjeant* v. *Dale*[1] " the law in laying down the strict rule (regarding the disqualification of Judges) has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibility of the litigant parties. One important object at all events is to clear away everything which engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

Two important recent decisions of the Calcutta High Court (*Radha Madhal Paikra* v. *King Emperor*[2] and *Abiar Rai* v. *Jhingur Tewari*[3]) require more than a passing notice.

The result of a series of decisions from 1894 to the beginning of 1910 has been upset and in the first of these cases, where in the course of the trial a Sub-Deputy Magistrate was deputed by the trying Magistrate to hold a local inspection and was examined as a witness after he had made the investigation, the learned Judges hold that it was at most an irregularity. In the second case, by extending the provision, of S. 392 of the old Code of Civil Procedure corresponding to Order 26, Rule 9 of the present Code, for local investigations in Civil Cases it is laid down that besides those authorised or directed by the Code of Criminal Procedure there is a class of local inspections under which very many cases fall and for which there is express provision in the Code of Civil Procedure. Reliance is placed on the Judgment of Mitter Acting C. J. and *Maclean* J. in *Joy Kumar* v. *Bundhee Lal*[4] a decision in a civil case. The conclusion arrived at in that case was that there was provision for local investigations by the Judge himself in civil cases. No

1. (1877) 2 Q. B. D. 558.
2. (1909) 15 C. W. N. 414.
3. (1910) 16 C. W. N. 426.
4. (1883) I. L. R. 9 C. 363.

doubt in discussing how the Court can take into consideration the result of such local investigation reference is made to the definition of the word "proved" in the Indian Evidence Act but the learned Judges after quoting S. 392 go on to say: "It is clear from this that the delegation of the duty of elucidating any matters in dispute by local investigation is to be made only when the presiding Judge cannot conveniently conduct the enquiry himself." Relying on this it is laid down in *Aliar Bai* v. *Jinghur Tewari*[1] that "the judicial system in this country of which the Evidence Act is a most important factor gives the court power to adjudge the existence of facts on matters before it as well as according as they are deposed to in the evidence."

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Vakil, High Court.

Calcutta.

NOTES OF INDIAN CASES.

Bhagbati Koer *v.* Sahudra Koer.—16 C. W. N. 834—We regret that the question as to the true nature of the estate in property purchased by a widow out of the savings of her husband's estate has not been discussed in the manner in which it should be by the learned Judges and we feel some difficulty in accepting the conclusion of the learned Judges in this case. The learned Judges admit that the question is not altogether free from difficulty and state: "The true test to be applied to cases of this description is to determine from the surrounding circumstances the intention of the widow. Did she intend to treat the disputed property as part and parcel of the estate of her husband or did she treat it as a temporary saving liable to be applied by her subsequently for her own purposes?" In the absence of any special circumstance we should think it would lie upon the reversioner to show that the property purchased by a widow out of her savings is not her absolute property but is such property as partakes of the character of her husband's estate. If the true principle of law as must now be admitted to be unquestionable is that the *net* income of the estate is property at the absolute disposal of the widow it would follow that the property purchased out of such *net* income is the absolute property of the widow. Whether any subsequent act on her part would divest the estate vested in her absolutely and would create a restriction against alienation which

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1. (1911) 16 C. W. N. 426 at page 429.

did not and could not exist at the time of the purchase is a question which has been assumed in favour of the reversioner but which we think is a very difficult question to be dealt with. In the case under notice one of the items originally belonged to the husband's estate. It was sold and passed into the hands of a stranger. The widow re-purchased it from such stranger. The learned Judges say that the inference is irresistible that the widow intended to treat it as part of her husband's estate. We fail to see where this inference lies and much less how the inference is irresistible. The mere fact of a purchase of property which belonged formerly to her husband's estate could not lead to any inference that the widow intended at the time of the purchase to treat such purchased property as part of her husband's estate. The learned Judges do not refer to any subsequent conduct. We think that in a case where it is admitted or shown that the property is purchased out of the net income or out of the savings made by the widow the *prima-facie* view is that the property partakes of the nature of the savings, *i.e.*, of the source which forms the means of acquisition. As regards the rent not realised there is greater difficulty in accepting the conclusions of the learned Judges. The learned Judges do not dissent from the view laid down in *Soudamini* v. *The Administrator-General*[1] and *Subramania Chetti* v. *Arunachellam.*[2] Rent which is not realized from the tenants should be on the same footing as income not realized by the widow which is in the hands of a stranger and which she has to recover afterwards. As pointed out by the learned Judges in the latter case the theory that the property purchased by a widow from her unspent income ought to be presumed to be the property not belonging to the widow but to her husband's estate is based upon an exploded doctrine that the control of the widow over the income was limited to such abstemious use as befitted the ascetic life led by her. Mitter J. relied upon this doctrine as part of the living law in Bengal: but even there it has since been completely abandoned. If a widow having a mere life estate as distinguished from a widow's estate would be entitled absolutely to the income accruing from the estate and that such income or the property purchased out of it would devolve on her own heirs it is difficult to conceive why that result should not follow in the case of a widow's estate which is more than a life estate.

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1. (1892) L. R. 20 I. A. 12.
2. (1904) I. L. R. 28 M. 1.

Jugal Kishore Marwari v. Ambika Debi.—16 C. W. N. 882.—We should think that the rule of decision has been stated rather too broadly by the learned Judges in this case. A third person put in a claim for attachment. He did not prosecute his claim and it was dismissed. The property was sold and the auction purchaser got symbolical possession. The original claimant obstructed. There was a report by the Amin to the Court of the obstruction. The obstructor also put in a claim under O. 21 r. 97 although it does not appear how this rule entitled him to make the application. The learned Judges hold that by reason of the original order dismissing the claim the claimant is precluded from resisting her and that the auction purchaser was entitled to possession without any inquiry. The learned Judges refer to O. 21 r. 63 as establishing their position. That rule however does not make every order passed on a claim conclusive. R. 60 speaks of one kind of order and that is as against the decree-holder. R. 61 refers to another kind of order and that relates to the claimant. R. 62 has reference both to the decree-holder and claimant. All these rules 60, 61 and 62 assume an investigation by the Court and an actual decision that property belongs to the claimant or to the judgment-debtor or to both. The order under R. 60 is that the property is not in the possession of the judgment-debtor or of some body in trust for him or that it is in possession of the judgment-debtor in trust for the claimant and that therefore the property be released from attachment. The order under R. 61 is one disallowing the claim on the ground that the property is in possession of the judgment-debtor as his own or in possession of some other in trust for him. The order dismissing a claim for default is not necessarily an order under R. 61. In the case of such default the Court may not adjudicate at all and may dismiss the claim just as it can do in the case of suits or other proceedings or the Court may proceed to adjudicate notwithstanding the default and hold that the property was in the possession of the judgment-debtor as his own property there being no evidence to the contrary. It is only an order based upon such adjudication or rather an order which adjudicates in such a manner that can have the conclusive effect stated under R. 63. When there is no such adjudication a mere order dismissing a claim for default cannot have the conclusive effect stated in R. 63. Where the order is one merely dismissing a claim for default it cannot be known on what the adjudication is based or what the adjudication is. It must be remembered that the proceeding is summary. If the claim preferred is late the Court may dismiss it without adjudication although the claimant is prepared to adduce evidence. The mere fact that a claim was

put in and dismissed cannot attract the extreme penalty attached by R. 63 especially when it must be admitted that the provisions are merely permissive.

The Rangoon Botatoung Company Limited. *v.* **The Collector of Rangoon.**—16 C. W. N. 961.—We do not think that the decision in this case is to be taken as an authority for the general proposition that in no case under the Land Acquisition Act there can be an appeal to the Privy Council. It must be taken with special reference to the case before their Lordships which was an appeal from the Chief Court of Lower Burma in a case decided by that Court in the exercise of its original jurisdiction. The reference was made by the Collector to the Chief Court and that Court consisting of a Bench of two Judges in the exercise of its original jurisdiction heard and decided it and their Lordships held that there was no appeal as a matter of right and we think their decision is strictly justifiable by the provisions of the Lower Burma Courts Act 6 of 1900 taken with Sections 109 and 111 of Civil Procedure Code. (595 596 O. C.) According to S. 8 of the Lower Burma Courts Act the Chief Court shall be the highest court of appeal. It is also a Principal Civil Court of Original Jurisdiction for the Rangoon Town. According to S. 1 the jurisdiction can be exercised by a single Judge of the Court. According to S. 14 of the same Act an appeal from any decree made by a single Judge of the Chief Court or by an order made by such single Judge of the Chief Court or by any order made by such single Judge and (when an appeal from such order is permitted by any such law) in the exercise of its original jurisdiction as the Principal Civil Court of Original Jurisdiction for the Rangoon Town or in the exercise of any other jurisdiction of a civil nature to which the Chief Court by that rule extend that section shall lie to a Bench of two other judges to the Chief Court. A power is also given to the Chief Court to make rules with the sanction of the Local Government providing for the exercise of any of its powers by a Bench of two Judges. Under S. 18 of the Land Acquisition Act any person who has not accepted the award of the Collector may by written application to the Collector require that the matter be referred by the Collector for determination to the Court. The Court according to S. 3 (4) is the Principal Civil Court of Original Jurisdiction. According to S. 8 Cl (e) of the Lower Burma Courts Act it is the Chief Court of Lower Burma. The reference was heard by a Bench of two Judges (apparently this it was in pursuance of some rule made under S. 9 Cl. (2)). However that

may be there can be no appeal under S. 14 of the Lower Burma Courts Act from the decision of two Judges. The appeal to the Privy Council was apparently made under Sections 595 and 596 of the Old Code. According to S. 595 of the Old Code an appeal to the Privy Council lay as a matter of right under Clauses (a) and (b) of that Section. Clause (a) relates to a final decree passed by a High Court or by any other court of final appellate jurisdiction but that is not this case. Clause (b) relates to a final decree passed by a High Court in the exercise of its Original Civil Jurisdiction. The special reference to the High Court in this case cannot have application to the Chief Court. The interpretation in the General Clauses Act X of 1897, S. 3 Cl (24) that High Court means the highest Civil Court of appeal cannot afford any ground for taking the Chief Court as the High Court in the exercise of its Original Jurisdiction. Further there may be a question under S. 595 whether an award under the Land Acquisition Act is a decree. Under the New Code the words " final order" are expressly included. However this may be we cannot say that the decision of the Privy Council was wrong in holding that there was no appeal from an award made by the Chief Court in the exercise of its Original Jurisdiction to the Privy Council.

SUMMARY OF ENGLISH CASES.

Dominion Cotton Mills Co., Ltd. *v.* Amyot: [1912] A. C. 546.

Company—Power of majority to bind minority in the absence of fraud and when the resolution is not ultra-vires.

The principles applicable to cases where a dissentient minority of shareholders in a company seek redress against the action of the majority of their associates are well settled. In order to succeed it is incumbent on the minority either to shew that the action of majority is *ultra vires* or to prove that the majority have abused their powers and are depriving the minority of their rights.

It is an elementary principle of the law relating to Joint Stock Companies that the Court will not interfere with the internal management of companies acting within their power, and in fact has no jurisdiction to do so. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or

in which the other share-holders are entitled to participate. It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue if the act where done regularly would be within the powers of the company and the intention of the majority of the share-holders is clear. Unless otherwise provided by the regulations of the company a share-holder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject matter of the vote. This is shown by the case before the Board of *The North-Western Transportation Co., Ltd.* v. *Beatty*[1]. In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained."

Reed-Newfoundland Company *v* Anglo-American Telegraph Company, Ltd. [1912] A. C. 555.

Limitation—Principal and Agent—Accounting—Agent trustee of Principal.

In the case of *Burdick* v. *Garrick*[2] an agent was entrusted with property which he was authorised to sell and he was directed to invest the proceeds in the name of his principal. Under this authority he received certain moneys and paid them into his own account at his bank. Afterwards, in an action for an account, the agent pleaded the Statute of Limitations, but Lord Hatherly L. C. said, " How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see" and the Court held that the Statue of Limitations had no application. Giffard L. J. followed in the same sense, and stated the principle broadly in these terms, afterwards cited with approval by Lord Macnaghten in *Lyell* v. *Kennedy*[3] "I do not hesitate to say that where the duty of persons is to receive property and to hold it for another and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it." In *Lyell* v. *Kennedy*[4] Lord Selborne in deciding that the facts were sufficient to establish a fiduciary character against a manager of property who had received rents on behalf of a principal said: " For the constitution of such a trust no

1. (1887) 12 A. C. 589.
2. (1870) L. R. 5 Ch. 233.
3. (1889) 14 A. C. at p. 463.
4. (1889) 14 A. C. at p. 457.

express words are necessary; anything which may satisfy a Court of equity that the money was received in a fiduciary character is enough".

A person using a telegraph wire of another for purposes other than those agreed to between the parties and deriving profit thereby was held in this case to be a trustee for the other and as such accountable for all the profits thereby made.

[Compare the words of S. 10 of the Indian Limitation Act and the decisions thereon. Ed.]

E. D. Sossoon & Co. *v.* Western Assurance Company.

[1912] A. C. 561.

Marine Insurance—" Perils" of the Sea—Meaning of.

Plaintiffs' opium stored in a wooden hulk moored in a navigable river was damaged by water percolating through some unknown leak on a side of the hulk covered by copper sheeting.

Held—" That the defendants who were an Insurance Company, that insured the plaintiffs' goods against ' perils ofthe sea ' were not liable for the damage.

Per *Cur*. There was no weather nor any other fortuitous circumstance contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the goods, no peril of the sea contributed either proximately or remotely to the loss. I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril *of* the sea. Again it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example against natural and inevitable action of the winds and waves which results in what may be described as wear and tear.

An attempt was made during the argument to attribute a different meaning to the expression " perils of the sea" when used in a policy on goods from that which it bears when used in a policy on ship, but no authority was cited for the distinction nor would it be right in principle to take any such distinction. In the case above cited an attempt was made to draw a distinction between the meaning to be given to the words when used in a bill of lading and in a policy of insurance, but Lord Herschell said. " It would in

my opinion be very objectionable unless well settled authority compelled it to give a different meaning to the same words occurring in two maritime instruments."

Fairclough v. Swan Brewery Company, Ltd. [1912] A. C. 565.

Mortgage—Equity of redemption—Contemporaneous agreement in bar of redemption.

There is no doubt that the broad rule is this: that the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security either by any contemporaneous instrument with the deed in question, or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction. The rule in comparatively recent times was unsettled by certain decisions in the Court of Chancery in England which seem to have misled the learned Judges in the Full Court. But it is now firmly established by the House of Lords that the old rule prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. The learned counsel on behalf of the respondents admitted as he was bound to admit, that a mortgage cannot be made irredeemable. This is plainly forbidden; is there any difference between the forbidding redemption and permitting it, if the permission be a mere pretence? Here the provision for redemption is nugatory. The incumbrance on the lease, the subject of the mortgage, according to the letter of the bargain falls to be discharged before the lease terminates, but at a time when it is on the very point of expiring when redemption can be of no advantage to the mortgagor even if he should be so fortunate as to get his deeds back before the actual termination of the lease. For all practical purposes this mortgage is irredeemable. It was obviously meant to be irredeemable. It was made irredeemable in and by the mortgage itself.

Attorney-General for Ontario v. Attorney-General for Canada: [1912] A. C. 571.

The Court and the Executive— Legislature allowing the executive to put questions to Court and submission of answers by Court—Whether ultra-vires.

Whatever might be the wisdom of a statute allowing Executive Government to put questions to and get answers from the

Supreme Court in the land it is no part of a Court's duty to enquire thereinto and to declare that the same is *ultra-vires* in as much as the Courts are to administer the law as it is and not to declare what ought to be proper for the legislature to rule, which function is purely one for the legislature to do. Though this privilege might be conceived to detract from the independence of the judiciary, yet in practice it will not be so in as much as the opinions of the courts on the points referred to would be purely advisory and will have no more effect than the opinions of the law officers of the Government and as the Parliament can control the action of the executive, if opinions are sought to be taken by the executive in a manner likely to affect the subjects. Examples are not wanting for such a privilege being given to the executive :—(1) The King of England can require any of his Privy Councillors who might be members of the Judicial Committee to advise him on any matter which might thereafter come before them as Judges. (2) The House of Lords has a right to summon the Judges and to ask of them (a) such questions as it might necessery for the decision of a particular case (b) in its legislative capacity to ask the Judges what the law is in order to better inform itself how if at all the law should be altered.

No inconvenience or impropriety having been suggested from the exercise of the above privilege in England, the existence of the privilege cannot be stigmatised as intrinsically abhorrent or subversive of judicial independence.

Kirley. *v.* Cowderoy : [1912] A. C. 599.

Possession of wild lands—Mere payment of taxes—Sufficient evidence of possession

A wild tract of land which was mortgaged as security of a certain loan was sought to be redeemed by the plaintiff when the defendant replied that the plaintiff had abandond the land as useless, that he, the defendant, paid to the knowledge of the plaintiff the taxes on the land, that under the law in force in the place the plaintift was not entitled to redeem after 20 years of adverse possession which the defendant claimed he had.

Their Lordships of the Privy Council who found that the plaintiff had abandoned the land, held that though the act of possession by the defendant, consisted merely in payment of taxes he was in adverse possession of the lands in as much as he performed the only act of possession of which the land appeared to be capable and that

according to the law of the place mortgagee's (defendant) adverse possession for 20 years barred the right of redemption.

Per *Cur.*—Possession must be considered in every case with reference to the peculiar circumstances, the character of and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these findings greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession."

In re **Wareham: Wareham *v.* Wareham.**

[1912] 2 Ch. 312.

Will—Construction—Bequest of rents and profits for life—Estate partly lease hold—Life-tenant entitled only to interest on proceeds of the sale of lease-hold.

Where a testator gave his wife the rents and profits of his estate partly consisting of lease-hold property for life and the residue to two other people. *Held*: the widow was not entitled to the whole rent of the lease hold property but only so much as would represent the dividend if the leasehold estate were sold at the end of the year of of the testator's demise and the proceeds invested.

Goodfellow *v.* Nelson Line (Liverpool) Limited.

[1912] 2 Ch. 324.

Company—Majority of Debenture holders having power to bind minority—Voting in support of personal interest—Permissible if no unfairness or oppression.

In this case the defendant company had issued certain debentures 4½ at per cent. secured in part by a Society and in part by a Trust, both of these being joint trustees entitled to certain remuneration for acting as such and also entitled to certain payments towards a sinking fund for the discharge of the debentures to be invested with them. The Society went into voluntary liquidation and offered to repay amounts invested with it if it was released from the guarantee. The debentures being well secured, there was little fear of the guarantors being called on to pay the debenture holders. Under these circumstances the company offered to accept the terms of the Society, proposing to issue 5 per cent. unguaranteed shares in place of 4½ per cent. guaranteed. The trust would not accept the

position unless payments taken under the trust deed were continued subject to deduction to the extent of the ½ per cent. payable as interest. The Trust themselves owned a large number of debenture shares. Under the Trust deed the majority had the power to bind the minority. When the matter was placed before the meeting of the debenture holders, the proposal was carried, the Trust as representing the shares it owned, voting in favour of the proposal. One of the minority brought a suit to restrain the Company giving effect to the resolution of the debenture-holders. His contention was that the resolution was in effect passed by "bribery", the persons benefitted by the arrangement being the parties that were instrumental in passing the resolution. Parker J. however refused to give effect to it. According to his Lordship, bribery was not a term appropriate to the case. His Lordship held that where powers are conferred by the trust deed on the majority to bind the minority, provided the majority exercise their powers bona-fide, and there is nothing unfair or oppressive about the arrangement (in which case the court will interfere), there is no equity preventing a debenture-holder voting for or against a scheme containing a special provision which may be necessary or advisable as a matter of business arrangement merely because he is interested therein. Each debenture holder may vote with regard to his individual interests, though these interests may be peculiar to himself and not shared by the other debenture holders. A secret bargain by one debenture holder for special treatment might be considered corrupt; but there can be no question of bribery when a scheme openly provides for the separate treatment of persons with special interests.

In re Trevor-Batyes Settlement : Bull *v.* Trevor-Batye : [1912] 2 Ch. 339

Deed—Construction—Proceeds of timber cut in the course of good husbandry—Life tenant entitled to.

A marriage settlement provided that the wife was to have life interest in certain property with power in the trustees to convert and invest the proceeds in freehold. In virtue of the power so vested, the trustees purchased some estate which had a number of beech trees on it. In the course of good husbandry, some trees had to be periodically cut. *Held*: that the proceeds formed a part of the rents and profits the benefit of which went to the wife.

H. Stevenson and Son, Limited *v.* Bradwell Healy and others.

[1912] 2 Ch. 344. (C. P.)

Interpleader—Remedy not available after Judgment in favour of one of the adverse claimants.

A suit was brought on an agreement for the payment of certain sums of money and a judgment was passed by consent. Subsequently the defendants applied to the Court to raise an interpleader issue as to whether certain other people were not entitled to those monies. The Court of appeal held, that the court could not raise the issue. An interpleader is permitted under Order XLVII r. 1. only " where a person seeking relief is under liability for any debt, money goods, chattels, for or in respect of which he is or expects to be sued by two or more parties making adverse claims thereto". With the action of one of the adverse claimants ripening into judgment there was an end to the application of the Section.

In re Thomas : Suttoo Carolen & Co, Limited *v.* Thomas :

[1912] 2 Ch. 348. (C. A.)

Executor and creditor—Fiduciary capacity at an end with personal decree against executor—Personal judgment debt " not owed in fiduciary capacity"—Liberty of subject not to be interfered with unless jurisdiction clear.

The sole creditors of a deceased person, brought an administration action against the executor and on proof that the latter had enough assets in his hands to pay off the debt got an order for payment against him personally. *Held*: the fiduciary relationship that existed between the creditor and the executor was at an end by the order and the creditors having elected to get a personal decree against the executor were not entitled to plead that the defendant was liable to be arrested under the exception to Sec. 4 in the Debtors' Act of 1869 which reserves to the court power to issue a writ of attachment against the person of the debtor where the debt is owed in a fiduciary capacity. There is no fiduciary relationship between a a judgment debtor and his creditor as such. " The liberty of the subject ought not to be interfered with unless it is quite clear that the court has jurisdiction " Farwell L. J.

JOTTINGS AND CUTTINGS.

Lord Halsbury:—Even in his Old Bailey days the future greatness of Lord Halsbury (says the *Globe*) 'lay slumbering in prophetic light. Mr. Montagu Williams relates how one of his contemporaries at the Central Criminal Court bet' that within twelve years Hardinge-Giffard would become Attorney-General, and that before he ended his career he would become Lord Chancellor.' One part of his prophecy was not fulfilled. It was never his happy lot to occupy the proud position of head of the Bar. Like his immediate successor, Lord Herschell, he found the Solicitor-Generalship a final stepping-stone to the Woolsack. Though as an advocate Lord Halsbury was chiefly engaged in grappling with facts, as a judge he has earned a great reputation in expounding the law. Lord Alverstone has described him as the best president of any Court before whom he had ever argued.' Lord Eldon, who held the Great Seal for twenty-five years, and Lord Hardwicke, who held it for twenty-three, are the only two Lord Chancellors with a longer record of service than Lord Halsbury's. The fourth place belongs to Lord Thurlow, who occupied the Woolsack for fourteen years. The shortest Chancellorship on record is that of Charles Yorke, the son of the first Lord Hardwicke, which lasted only three days. The Great seal was delivered to him on Junuary 17, 1770, and he died by his own hand on January 20, before his patent of peerage had been made out. Though Lord Halsbury's record of service on the Woolsack has been excelled by two of his predecessors, no Lord Chancellor ever had the distribution of so much patronage. There is not a judge in the Supreme Court who was on the Bench when Lord Halsbury first became Lord Chancellor twenty-seven years ago. The senior judge is Lord Macnaghten who has been a Law Lord for a quarter of a century. :—*The Law Journal.*

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The King's birthday as a holiday:—Of all the nonsensical new ideas that we have ever seen, commend us to the new regulation which has been issued, by which "the day appointed to be kept as the King's birthday" is added to the days on which "the several offices of the Supreme Court" are closed. Up to now the rule has simply been that "it shall not be necessary for the Court of Appeal and the High Court of Justice to sit on the day appointed to be kept as the King's birthday." That was bad enough, and now we have a compulsory closing. There seems to be no rhyme or reason in it. Loyalty is all very well and excellent, but we fail to see any loyalty in the taking of a holiday. We can understand the idea in a school,

where excuses for a holiday are eagerly sought after, but for those in authority to compel the breaking off for a day on such a ground seems to us childish. We quite agree with our contemporary, the *Law Journal*, in its note on the matter as follows: "This form of celebration is justified neither by the example of other public departments, nor by the state of business in the Courts themselves. The law lords do not think it necessary to celebrate the King's birthday by absenting themselves from their judicial duties, nor does Parliament think it proper to display its loyalty by interrupting its work.' —*The Students' Law Journal*

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The Gazetteer and New Daily Advertiser :—A legal Adversement of 1873 in an old newspaper for 27th November, 1783, which was a daily newspaper in its time, says as follows:—"The inexperience, ignorance, or indolence of the generality of persons in the Law, and the exorbitancy of their demands, deters people from having recourse to them but in cases of absolute necessity. At the Office, No. 2, Queen Street, Soho, is conducted every sort of Law Business, Equity, and Conveyancing, by Gentlemen of acknowledged abilities, on the most moderate terms, and without requiring money till the business is entirely concluded. People in town or country may receive advice without any demand being made for it. Address a line post-paid, or apply any day, from ten till one, to Mr. Osborne, clerk at the above Office; or to Mr. Thompson, at the other Office, at 'Sir Robert Gunning's Arms,' Horton Inn, at Horton, Northamptonshire." This is funny in the extreme, and it may tend to make us thankful that we have now a Law Society and rules of etiquette. Fancy this is an advertisement of less than 130 years ago! Well, times have changed as regards what is deemed decent. Let us hope also that there is nowadays none, or at any rate but little, of the "inexperience, ignorance and indolence" boldly alluded to in the above, interesting cutting. It is very quaint also to notice that apparently one of the offices of the advertisers was within the social doors of a country inn or public-house.—*Ibid.*

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When is a Court a Theatre:—That classic aphorism of our Bench, 'This Court is not a theatre,' will have to undergo revision (says the *Globe*) if our judges follow the example of one of their colleagues in the United States. The innovator is Judge Holt, of the United States Circuit Court, who has decided as the result of testimony brought in an action by a barber against Mr. David Belasco, the well-known playwright, to turn his court into a theatre, or, rather,

Mr. Belasco's theatre into his court. The plaintiff alleged that Mr. Belasco plagiarised one of his dramas, and the judgment of the court has been postponed until he produces both the plays in question in his theatre, which will be converted into a court of law for the occasion, in order that the judge may have the opportunity of deciding on the charge of plagiarism.—*The Law Journal.*

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Mr. Justice Darling:—Even humorous incidents in Court are occasionally funny. This one is. During the reading of certain translated documents, Mr. Justice Darling asked whose translation it was. Mr. Danckwerts: God knows; I don't. Mr. Justice Darling: Are you quite sure that what is not known to you is known at all? Mr. Danckwerts: I am not certain of the applicability of that question. I will answer it when I am. I will make a bet that it was a translation by the Foreign Office. My experience has been that their translations are always inaccurate.—*Law Notes.*

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The hand that Committed House-breaking.—A lawyer was defending a burglar accused of housebreaking. "I submit, your Honour," he concluded, "that my client did not break into the house at all. He found a window open, merely inserted his arm and removed a few articles. Now, my client's arm is not himself, and I fail to see how you can punish the whole person for an offence committed by one of his limbs only." "That argument," said the judge gravely, "is well put. Following it out logically, I sentence the prisoner's arm to twelve months' imprisonment. He can accompany it or not as he chooses." Whereupon the prisoner smiled, and, with his lawyer's aid, unscrewed his cork arm, and leaving it in the dock, walked out.—*Ibid.*

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A Firm Judge:—"I never sat in the trial of a case in which I cared two cents which side gained it," once said a judge, boasting of his impartiality. "Old Ben Wade" was not that sort of a judge, while administering justice in five Ohio counties. He saw at once the right of a case, and made the jury discern the real issue. Once when trying a case his rulings made the prosecuting attorney snarl out: "I have always understood that it was the province of the jury to decide the facts; the court has nothing to do with them." "Gentlemen," replied the unmoved judge, "the attorney for the state is correct; it is your province to decide the facts. The court has nothing directly to do with

them—if it had it would not take long." The retort prompted the jury to return a verdict of acquittal after a few minutes' consideration.

Few of Wade's rulings were reversed by the Supreme Court, but there was one notable exception. A difficult case which he had decided after much consideration was reversed by the higher court and sent back to be tried again. At the second trial Judge Wade adhered to his former decision. " But your, Honour, the Supreme Court reversed your former jndgment," exclaimed the surprised counsel. " Yes, so I have heard; I will give them a chance to get right," he quietly replied. The case was again taken to the Supreme Court, which reversed its own judgment and affirmed Wade's decision.—*The Green Bag.*

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Joinder of Issue.—Judge Gary tells the story of a Missourian who came in the circuit clerk's office, in response to a summons, and getting out the old common-law courts from the pigeon-hole in the clerk's desk, sat down behind the stove to read them. When he got through he asked the clerk what he must do. The clerk said:

" You will have to get a lawyer."

" I haven't any money to hire one, can't I do something ? ".

" Well, you have got to join issue."

" Well, but I don't know how to do that."

" Well, you have got to deny, of course, everything that is said there."

So the old gentleman took out his spectacles, and went back and sat down at a table and a wrote at the bottom of the declaration, " The above are a damned lie." And thus was issue joined.—*The Central Law Journal.*

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Lord Haldane and the Judicial Committee :—It is very welcome news that Lord Haldane intends to set himself to strengthen and to extend the work of the Judicial Committee of the Privy Council. The Lord Chancellor has the large reforming mind which is fitted to carry out the development of the Imperial Court of Appeal on lines which will secure for it the confidence of the self-governing Dominions. He announced at Dundee this week that he has introduced a Bill into Parliament which will make the Court stronger and more representative, and it is to be hoped that it will be free from any controversial provisions so that may pass without

obstruction into law. Presumably he has not adopted the Bill of his predecessor, which proposed to create two further Lords of Appeal in Ordinary, who would be judges of the two divisions of the Imperial Court of Appeal sitting in turn as the House of Lords and the Judicial Committee. The defect of that scheme was that it contained no provision for appointing distinguished colonial judges as permanent members of the tribunal. And the Dominions with their different system of law naturally are distrustful of a final Appellate Court which may often contain not a single Judge conversant with the law of the country from which the appeal comes. It is true that the Appellate Jurisdiction Acts of 1895 and 1908 empower the judges of the highest Courts of the Empire who are Privy Councillors to sit on the Judicial Committee; and during the past year the power which had hitherto been little exercised has been put into regular operation. Lord de Villiers, the Chief Justice of South Africa, and Sir Charles Fitzpatrick, the Chief Justice of Canada, have assisted at the hearing of a number of important appeals. But the constant presence of one or two representatives of Great Britain possessing a mastery of Roman-Dutch and Canadian-French law would add both to the authority and dignity of the Court; and the claims of Australia to have one of her judges present at the hearing of Australian appeals could be met by grouping together all those cases at a season of the year when a member of her High Court could be in England. The appeal to the King in Council is the most solid legal bond of Empire which we possess: but a tendency has shown itself of recent years in the Dominions, because of their dissatisfaction with the present state of the Court, to weaken that bond by restricting the right of appeal. As a result of the first Imperial Conference great Improvements were introduced in the procedure of the Judicial Committee; the second Conference called for reforms in its composition. If Lord Haldane is able to carry through those reforms he will have deserved well of the Empire. —*The Law Journal.*

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Women as Lawyers.—The Resolution in the Law Society Meeting:—Mr. BELL, at the conclusion of his paper, moved the following resolution, which was seconded by Mr. H. WILLS CHANDLER (Basingstoke):—

'This meeting approves the principle that sex shall case to be a bar to entrance to the legal profession, and calls upon the Council of the Law Society to support the Bill about to be laid before Parliament enabling competent women to practice as barristers, solicitors, and Parliamentary agents.'

The opposition to this motion was led by Mr. ROBERT ELLECT, who, after remarking that he agreed with Mr. Bell to the extent of believing that many women would make better lawyers than several male lawyers whom he knew, disposed of Mr. Bell's contention that the use of the word 'person' in the Solicitors Act already enabled women to be admitted as solicitors. If, he observed, Mr. Bell's contentions were well founded, it was not necessary for the Council to support a Bill which proposed to make women eligible for membership of the profession. In whose interest, he asked, was the proposal made? Not in the interest of the profession, for there was a sufficient number of solicitors to transact all the legal business of the country; not in the interest of the public, for no public demand had been made for it; not in the interest of women themselves, for it would be an unkind thing to admit women to so laborious a profession, in which owing to the increase of competition, the remuneration would be further reduced. Their great faculty for continuous speech made women more fit for the Bar, and it would be time for their branch of the profession to be opened to them when the Benchers decided to allow women to be called to the Bar. Mr. JAMES W. REID, who was even more vigorous in his condemnation of the proposal, observed that a school boy became an honest animal only when he got into contact with the world. 'And woman,' he concluded amidst some exclamations of astonishment, 'has not yet learned to be honest.' In Mr. C. E. LONGMORE (Hertford), a member of the Council, the resolution found a warm supporter. 'You have spent thousands of pounds in educating your women in schools and colleges,' he exclaimed, 'and the professors will tell you that some of their ablest pupils are women. Yet when the time comes for them to put their exertions to some advantage you shut them out. For trumpery reasons such as we have heard to-day you refuse them facilities for earning their living.' The discussion, after Mr. BOYD ANDERSON had dealt with the action of the Society of Law Agents in Scotland in the matter, came to a somewhat unexpected end. Mr. J. H. JONES (Gloucester), who, while believing that the time must come when women would be admitted to the profession, saw no reason for hastening it, moved the previous question, and the motion, seconded by Mr. RILEY (Manchester), was carried by a substantial majority.—*Ibid*

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